



09 SEP 2019

Dear [REDACTED]

Official Information Act request: New Zealand Bill of Rights Act 1990

Thank you for your email of 12 August 2019 requesting, under the Official Information Act 1982 (the Act), information about amendments to the New Zealand Bill of Rights Act 1990 relating to declarations of inconsistency. Specifically, your request was for the following information:

All advice (including memos, briefings, aides memoire, cabinet papers, and oral advice, including oral advice which has not yet been reduced to writing) on proposals to strengthen the New Zealand Bill of Rights Act 1990. For the avoidance of doubt, I am not requesting emails at this stage; I may make a subsequent request for them if it seems the formal record is insufficient.

As detailed in the appended table, I have identified 13 documents that fall within scope of your request. As you will see in the table, some information has been withheld under the following sections of the Act:

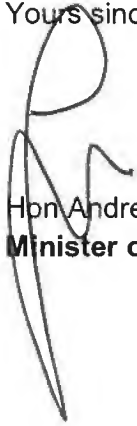
- Section 9(2)(a) to protect the privacy of natural persons;
- Section 9(2)(f)(iv) to maintain the constitutional conventions for the time being which protect the confidentiality of advice tendered by Minister of the Crown and officials;
- Section 9(2)(g)(i) to maintain the effective conduct of public affairs through the free and frank expression of opinions; or
- Section 9(2)(h) to maintain legal professional privilege.

In addition, some information is redacted, as it relates to other topics and does not relate to your request.

I am satisfied that there are no other public interest considerations that render it desirable to make the information withheld, under section 9 of the Act, available.

If you are not satisfied with my response to your request, you have the right to complain to the Ombudsman under section 28(3) of the Act. The Ombudsman may be contacted by email at info@ombudsman.parliament.nz.

Yours sincerely

A handwritten signature in black ink, appearing to be 'A. Little', written over the printed name.

Hon Andrew Little
Minister of Justice

Appendix 1: Bill of Rights Act 1990 documents

Doc	Date	Title	Comments
1	13 December 2017	Briefing: Declarations of Inconsistency with the New Zealand Bill of Rights Act 1990	Some information is withheld under sections 9(2)(a), 9(2)(f)(iv), and 9(2)(h)
2	18 January 2018	Legislative Bid	Some information is withheld under section 9(2)(f)(iv)
3	14 February 2018	Aide-memoire: Declarations of Inconsistency with the New Zealand Bill of Rights Act 1990	Released in full
4	19 February 2018	Cabinet paper summary: Declarations of Inconsistency with the New Zealand Bill of Rights Act	Released in full
5	19 February 2018	Cabinet paper: Declarations of Inconsistency with the New Zealand Bill of Rights Act	Released in full
6	21 February 2018	Cabinet Social Wellbeing Committee Minute of Decision (SWC-18-MIN-0006)	Released in full
7	21 February 2018	Aide-memoire: Declarations of Inconsistency with the NZ Bill of Rights 1990	Released in full
8	27 February 2018	Cabinet Minute of Decision (CAB-18-MIN-0057)	Some information is withheld as it is out of scope
9	6 April 2018	Aide-memoire: Declarations of Inconsistency – preliminary discussions with key experts	Released in full
10	9 November 2018	Aide-memoire: Declarations of inconsistency – Supreme Court Judgment Attorney-General v Taylor [2018] NZSC 104	Released in full
11	17 December 2018	Aide-memoire: Declarations of Inconsistency – information for meeting with Justice officials	Withheld in full under section 9(2)(f)(iv)
12	12 February 2019	Briefing: Declarations of Inconsistency with the New Zealand Bill of Rights Act	Withheld in full under section 9(2)(f)(iv)
13	4 April 2019	Aide-memoire: Declarations of Inconsistency with the NZ Bill of Rights Act – A-G correspondence on draft joint Cabinet paper <ul style="list-style-type: none"> - Attachment 1: Declarations of Inconsistency with NZBORA – Letter from the Attorney-General - Attachment 2: Declarations of Inconsistency with the New Zealand Bill of Rights Act – Draft Cabinet paper 	Withheld in full under sections 9(2)(f)(iv) and 9(2)(g)(i) <ul style="list-style-type: none"> - Attachment 1 withheld in full under section 9(2)(g)(i) - Attachment 2 withheld in full under section 9(2)(f)(iv)



Hon Andrew Little, Minister of Justice

Declarations of Inconsistency with the New Zealand Bill of Rights Act 1990

Date	13 December 2017	File reference	HUM 09 01 07
------	------------------	----------------	--------------

Action sought

Timeframe

Indicate your preferred option for recognising and responding to declarations of inconsistency.

22 December 2017

s9(2)(f)(iv)

Forward a copy of this briefing to and discuss this matter with Hon David Parker, the Attorney-General, and indicate if you wish to take an item to Cabinet (as an oral item) in the new year on the matter of declarations of inconsistency.

Contacts for telephone discussion (if required)

Name	Position	Telephone (work)	Telephone (a/h)	First contact
Ruth Fairhall	Deputy Secretary, Policy	04 498 2399	s9(2)(a)	<input type="checkbox"/>
Caroline Greaney	General Manager, Civil and Constitutional	04 918 8584	s9(2)(a)	<input checked="" type="checkbox"/>
David Crooke	Chief Advisor, Civil and Constitutional	04 494 9912	s9(2)(a)	<input type="checkbox"/>

Minister's office to complete

- ☐ Noted ☐ Approved ☐ Overtaken by events
☐ Referred to: _____
☐ Seen ☐ Withdrawn ☐ Not seen by Minister

Minister's office's comments

In Confidence

Purpose

1. The purpose of this briefing is to provide you with:
 - 1.1. an overview of the approach of New Zealand's senior courts to making declarations of inconsistency under the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act), and
 - 1.2. options for the Government's policy approach to declarations of inconsistency.
2. This briefing does not address the substantive issue of prisoner voting rights discussed in *Attorney-General v Taylor*¹ or provide advice about how the Government should respond to the declaration of inconsistency issued by the High Court in that case.

Executive Summary

3. In 2015, in *Taylor v Attorney-General*², the High Court made a declaration that a provision of the Electoral Act 1993 is inconsistent with the Bill of Rights Act. The Crown argued the senior courts do not have the power to make such a declaration in the absence of explicit statutory authority conferred by Parliament. The High Court rejected that argument and so did the Court of Appeal earlier this year. The Supreme Court will hear an appeal in March 2018.
4. In *Taylor*, the Court of Appeal stated that the senior courts have an inherent common law power to issue declarations of inconsistency, which is confirmed by the Bill of Rights Act. This raises an important constitutional question about the appropriate roles of the Judiciary and Parliament.
5. Declarations of inconsistency could play an important constitutional function by providing a remedy for legislative breaches of the Bill of Rights Act. This would enhance the legitimacy of the system by making Parliament more accountable for meeting fundamental human rights norms. The senior courts could exercise such a power to make declarations if that power were conferred on them by Parliament. This is the approach taken in comparable overseas jurisdictions.
6. We have identified three options for the Government's policy approach to declarations of inconsistency:
 - 6.1. maintain the status quo (i.e. neither provide a mechanism for recognising declarations nor clarify the senior courts do not have the ability to make a declaration)
 - 6.2. introduce legislation to provide for making and responding to declarations of inconsistency
 - 6.3. introduce legislation to clarify the senior courts do not have the ability to make declarations of inconsistency.
7. s9(2)(f)(iv)

¹ *Taylor v Attorney-General* [2015] NZHC 1706.

² *Attorney-General v Taylor* [2017] NZCA 215.

What is a Declaration of Inconsistency?

8. A declaration of inconsistency is a formal statement, granted by a court as a remedy, that legislation is inconsistent with the plaintiff's fundamental human rights protected by the Bill of Rights Act. The declaration informs the public and Parliament that an Act is inconsistent with fundamental human rights. It does not affect the validity of the Act or anything done lawfully under the Act.
9. Section 92J of the Human Rights Act 1993 (as amended in 2001) empowers the Human Rights Review Tribunal to issue declarations of inconsistency, stating legislation is inconsistent with the right to be free from discrimination affirmed in section 19(1) of the Bill of Rights Act. In the case of a breach authorised by legislation, the only remedy permitted by the Human Rights Act is a declaration that the legislation is inconsistent with section 19(1) of the Bill of Rights Act.
10. Section 92K of the Human Rights Act requires the Minister responsible for administering the inconsistent legislation to inform Parliament about the declaration and provide the Government response. The most recent Government response to a declaration under the Human Rights Act was in 2016 in respect of *Adoption Action Inc v Attorney-General*.³
11. There is no explicit power in legislation to issue declarations of inconsistency in respect of other rights affirmed in the Bill of Rights Act or by jurisdictions other than the Human Rights Review Tribunal.

Why are Declarations of Inconsistency an issue now?

12. The question of whether the courts can issue declarations of inconsistency under the Bill of Rights Act has been the subject of debate for some time. It has become an issue now because the High Court issued one for the first time in *Taylor v Attorney-General*, which the Court of Appeal upheld. In that case, five prisoners, including Mr Arthur Taylor, brought proceedings in the High Court seeking a declaration that the 2010 amendment to the Electoral Act 1993 prohibiting all prisoners from voting is inconsistent with their electoral rights under section 12 of the Bill of Rights Act.⁴ The correct interpretation of the Electoral Act, or the fact that the relevant provision is inconsistent with the Bill of Rights Act, was not in dispute.
13. The High Court agreed that the 2010 amendment was inconsistent with the Bill of Rights Act and could not be justified. It issued a formal declaration of inconsistency as a remedy for the plaintiffs. The Crown appealed to the Court of Appeal and argued declarations of inconsistency were not part of the senior courts' inherent judicial function, and jurisdiction could only be conferred by Parliament through legislation. The Court of Appeal dismissed the appeal unanimously. It concluded that the power to issue declarations derives from the common law jurisdiction to consider questions of law, including inconsistencies between statutes. The Crown appealed to the Supreme Court, which will hear the appeal in March 2018.

³ *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9.

⁴ At the time the 2010 amendments were progressing through Parliament, the inconsistency with the Bill of Rights Act was brought to the attention of Parliament through the Attorney-General's report under section 7 of the Bill of Rights Act.

14. Prior to *Taylor*, the courts had not issued formal declarations of inconsistency but had identified inconsistent legislation by what is referred to as a *Hansen* indication. The key difference between a *Hansen* indication and a declaration of inconsistency is that a *Hansen* indication is not granted as a remedy for a plaintiff. It means only that, as part of its reasoning in a case, a court has concluded a provision of an Act is inconsistent with the Bill of Rights Act. In *R v Hansen*⁵, the Supreme Court found that a provision of the Misuse of Drugs Act 1975 was inconsistent with the presumption of innocence affirmed in section 25(c) of the Bill of Rights Act. However, the main issue before the Supreme Court was the correct interpretation of the Misuse of Drugs Act (in light of the Bill of Rights Act). The conclusion that the Misuse of Drugs Act could not be interpreted in a way that is consistent with the Bill of Rights Act was ancillary to that purpose.

Should the Courts be able to issue Declarations of Inconsistency?

The Crown's position is the Court only has the power if conferred by Parliament

15. s9(2)(h)

16. s9(2)(h)

17. s9(2)(h)

The Crown's position accepts that the senior courts could, in principle, exercise such a power but only if it is conferred on them by Parliament.

Declarations could play an important constitutional function

18. Declarations of inconsistency can enhance the legitimacy of the system by making Parliament more accountable for meeting fundamental human rights norms. If Parliament makes a law that the senior courts consider to be inconsistent with the fundamental human rights affirmed in the Bill of Rights Act, it serves a useful public policy function to bring it to the attention of the public.
19. Declarations of inconsistency also provide a mechanism for bringing unintentional breaches of the Bill of Rights Act to the attention of Parliament. For example, legislation enacted in good faith might later be found to be inconsistent with fundamental human rights when it is interpreted and applied in practice. In this way, Parliament can benefit from the expert opinion of the Judiciary and decide to amend the law accordingly.

⁵ *R v Hansen* [2007] NZSC 7.

20. A judicial power to make declarations of inconsistency would augment section 7 of the Bill of Rights Act. Section 7 requires the Attorney-General to inform Parliament about any provision in a Bill that appears to be inconsistent with any of the rights and freedoms affirmed in the Bill of Rights Act. Parliament is the final arbiter of what constitutes a justifiable limit on fundamental rights and freedoms. The purpose of section 7 is to ensure Parliament's decision is informed by expert opinion. The power to make declarations of inconsistency would also provide an additional incentive for Parliament to consider section 7 reports carefully before enacting legislation that might be contrary to the Bill of Rights Act.

Comparable jurisdictions have declarations of inconsistency but with a statutory basis

21. There are comparable jurisdictions that provide for declarations of inconsistency or equivalents in legislation, notably the United Kingdom, and Victoria and the Australian Capital Territory (ACT) in Australia. In Canada, the Supreme Court has a stronger power but Parliament remains the final decision-maker. We are not aware of any similar jurisdictions where the courts have issued declarations of inconsistency with a human rights statute without a statutory basis.
22. In the United Kingdom, the Human Rights Act 1998 empowers superior courts to issue formal declarations of legislative incompatibility with the rights found in the European Convention on Human Rights. A declaration of incompatibility does not affect the validity, operation, or enforcement of the law. The Act empowers the Government to make a remedial order addressing the violation (essentially, amending the inconsistent provisions) but there is no domestic legal obligation to make such an order.
23. In the ACT, the Human Rights Act 2004 empowers the courts to make a declaration of incompatibility in respect of a Territory law. In Victoria, the Victorian Charter of Human Rights and Responsibilities Act 2006 empowers Victorian courts to issue a declaration of inconsistent interpretation that operates in the same manner. A declaration by the court does not affect the validity, operation, or enforcement of the law, but does require a Parliamentary response from the Attorney-General in ACT and the responsible Minister in Victoria. Before the court makes any such declaration, the Attorney-General and the Human Rights Commission must be given an opportunity to intervene. In the ACT, only eight cases have considered the declaration of incompatibility mechanism since 2004.
24. In Canada, the Supreme Court can strike down legislation that is inconsistent with the Canadian Charter of Rights and Freedoms, but the Charter allows Parliament or provincial legislatures to override certain portions of the Charter. Cases in which the striking down of legislation is sought are far more common in Canada than declaration of inconsistency cases in United Kingdom or Australia. The power to override the Charter has been used by the Canadian Parliament only very sparingly.

The operational implications are likely to be small

25. We have considered whether conferring a formal power on the senior courts to make declarations of inconsistency would create an incentive to bring litigation against the Crown. This could have operational implications for the senior courts, and increase applications for legal aid. It is not possible to predict precisely the possible number of applications for declarations of inconsistency, but the existing power of the Human Rights Review Tribunal provides some basis for comparison.

26. Since 2002, we understand the Tribunal has received only four applications (not counting one that was struck out) seeking a declaration that legislation is inconsistent with the right to be free from discrimination affirmed in section 19(1) of the Bill of Rights Act. The Tribunal has issued three declarations. Since 2007, and prior to *Taylor*, there were eight applications to the High Court for declarations of inconsistency under the Bill of Rights Act. None resulted in a declaration being granted.
27. Based on these volumes, it seems likely that only a small number of applications for declarations of inconsistency under the Bill of Rights Act may arise in any given year.

Options for the Government's policy approach to Declarations of Inconsistency

28. We have identified three options for the Government's policy approach to declarations of inconsistency. These are summarised below.
- 28.1. The decision in *Taylor* does not require any action from the Government so it could choose to maintain the status quo (i.e. neither provide a mechanism for recognising declarations nor clarify the senior courts do not have an ability to make declarations).
- 28.2. If the Government accepts the senior courts should be able to issue declarations of inconsistency, it could introduce legislation to provide for making and responding to declarations in a way that respects the relationship between the Judiciary and Parliament. ✓
- 28.3. If the Government does not accept the senior courts should have the power to issue declarations of inconsistency as a remedy, then the Government could introduce legislation to clarify the senior courts do not have the ability to make declarations.
29. We also considered the option of the Government recognising declarations of inconsistency through a non-legislative response mechanism such as a Cabinet Office Circular or by proposing an amendment to the Standing Orders of the House of Representatives.
30. However, these non-legislative options would not address a fundamental problem with declarations raised by the Crown in the *Taylor* case when it argued that the power to make declarations must be conferred by Parliament. Essentially, the precedent set in *Taylor* would remain the basis for issuing the declaration with the circular or standing order forming the basis for the Government response. This would be particularly problematic in the case of a Cabinet Office Circular because there would not be even tacit acknowledgment by Parliament of the power to make declarations. Also, non-legislative mechanisms would not have the same status as legislation and might not be as enduring. For these reasons, we do not consider non-legislative options to be viable.

Maintain the status quo

31. This option accepts the senior courts can make declarations (subject to the outcome of the Supreme Court case). It does not provide any formal mechanism to require the Government to acknowledge and respond to the declaration. This would provide flexibility about whether and how to respond to a declaration depending on the circumstances. It would not involve any interference with the existing jurisdiction of the courts (i.e. overruling *Taylor*) or any extension of that jurisdiction.

32. This option could create uncertainty about the nature of the remedy available and whether it is effective. Without the clarity of a legislative or operational mechanism, it is possible there could be confusion about whether a court has issued a declaration or a *Hansen* indication.
33. This option would be inconsistent with the existing power for the Human Rights Review Tribunal to issue declarations under the Human Rights Act. The current ability for a lower court to make declarations in respect of one provision of the Bill of Rights Act raises the question of why the senior courts cannot do the same for a broader range of rights. There does not appear to be any principled basis for drawing such a distinction.
34. s9(2)(h)

Create a legislative mechanism to make declarations effective

35. The option to legislate for declarations of inconsistency would be consistent with the Crown's position in *Taylor*; that the senior courts' power to make declarations should be conferred by Parliament. This could take the form of provisions similar to those in the Human Rights Act in respect of declarations issued by the Human Rights Review Tribunal. It could also be a similar approach to comparable jurisdictions such as the United Kingdom and Australia, which provide a statutory basis for declarations of inconsistency (see paragraphs 21 to 23).
36. In other words, the provision could:
- 36.1. empower the senior courts to declare that legislation is inconsistent with the rights of an individual plaintiff
- 36.2. specify that where any unjustified limitation of an individual's rights was authorised or required by legislation, the only remedy available is a declaration that the legislation is inconsistent with the Bill of Rights Act, and
- 36.3. require the Government to bring the declaration to the attention of Parliament and provide advice about the Government's response.
37. In addition to the general advantages outlined earlier in this briefing, this option would make declarations of inconsistency a more effective remedy for legislation that is inconsistent with the Bill of Rights Act. As it currently stands, the senior courts can make declarations but they cannot require the matter to be brought to Parliament's attention. In this respect declarations differ from other types of remedies because they require additional 'machinery' to make them operate properly.
38. This option could also give individuals greater assurance that limitations of their rights will be recognised and addressed. This could enhance the legitimacy of processes and public confidence by making Parliament more accountable. The appropriate legislative vehicle for such a provision would be an amendment to the Bill of Rights Act.

agree with reverting to
Bill. Shouldn't Govt. have
to option
of either
confirming,
amending
or
repealing
the
offending
provision?
Discuss with
Speaker/Clerk?

Legislate to remove power to make declarations

39. This option would clarify that the senior courts do not have the power to issue a declaration on the basis that it is the role of Parliament to determine the appropriate limits of fundamental human rights.
40. It could be controversial, given that the courts have only just declared this remedy to be available. Excluding the power to make declarations would rule out the only possible remedy for inconsistent legislation. There would be no means of testing whether legislation was inconsistent with an individual's rights and, if it was inconsistent, there would be no means of legally challenging the legislation.
41. Removing the remedy from future legal actions could be perceived as an attempt to shield Parliament's law from scrutiny by the courts. In this way, it would alter the balance of power between the three branches of state, tilting it towards Parliament and the Executive, and away from the Judiciary. New Zealand's constitution depends on a balance of power between the three branches. If any one branch becomes too weak or too strong, the constitutional checks and balances may not work as effectively. This could undermine legitimacy of the law-making system.

s9(2)(f)(iv)

42. s9(2)(f)(iv)

43. s9(2)(f)(iv)

44. s9(2)(f)(iv)

Consultation

45. The Ministry of Justice consulted Crown Law about this briefing. The Supreme Court will hear the appeal in the *Taylor* case in March 2018. s9(2)(h)
46. Due to the relevance of the policy options to the impending appeal in the *Taylor* case, you may wish to discuss this matter, and share this paper, with the Attorney-General.

Next steps and Timeframes

Next steps on policy options

47. The Ministry can provide further advice about the process to implement your preferred option for the Government's policy approach to declarations of inconsistency.
48. Depending on your preferred option, you might wish to conduct public consultation to test the consensus for change. The Ministry can also provide further advice about consultation options.
49. We will also prepare a legislation bid, by 26 January 2018, on the basis of your preferred option. Due to the timing for legislation bids, we are seeking confirmation of your preferred option by 22 December 2017.

Implications for Supreme Court proceedings

50. In March 2018, the Supreme Court will hear the Crown's appeal in the *Taylor* case. Crown Law could indicate in its submissions to the Supreme Court that the Government is considering this matter. This would require a decision by the Government that could be publicly announced by mid-February 2018.
51. That decision would not need to be a final policy decision but merely an indication that the Government is undertaking work in this area. This could be achieved by seeking Cabinet agreement (possibly as an oral item) in the new year. The Ministry can provide your office with supporting material for you to take such an item to Cabinet.

Recommendations

52. It is recommended that you:
 1. **Indicate** your preferred option for recognising and responding to declarations of inconsistency:
 - 1.1. maintain the status quo (no legislation and no Government policy response) YES / NO
 - 1.2. create a legislative mechanism for making and responding to declarations of inconsistency YES / NO
 - 1.3. legislate to clarify the senior courts do not have the ability to make declarations YES / NO
 2. **Indicate** if you wish the Ministry of Justice to provide you with further advice on conducting public consultation on this matter YES / NO
 3. **s9(2)(f)(iv)**
 4. **Forward** a copy of this briefing to and discuss this matter with Hon David Parker, the Attorney-General YES / NO

5. **Indicate** if you wish to take an item to Cabinet (as an oral item) in ☒ YES / ☐ NO the new year on the matter of declarations of inconsistency.



Ruth Fairhall

Deputy Secretary, Policy

☒ APPROVED ☐ SEEN ☐ NOT AGREED



Hon Andrew Little

Minister of Justice

Date 17/12/17

RELEASED UNDER THE OFFICIAL INFORMATION ACT 1982

In Confidence

Office of the Minister of Justice

Cabinet Legislation Committee

**New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill: Request for
Priority in the 2018 Legislation Programme**

Summary information

- 1 Details about the bid for legislation:
 - 1.1 the portfolio of sponsoring Minister: Justice;
 - 1.2 the department responsible: Ministry of Justice (contact Hayden Kerr, Policy Manager, Civil Law and Human Rights, 04 913 9174);
 - 1.3 the title of the proposed Bill: NZ Bill of Rights (Declarations of Inconsistency) Amendment Bill;
 - 1.4 s9(2)(f)(iv)
 - 1.5 the estimated size and complexity: small size and of low to medium complexity; and
 - 1.6 s9(2)(f)(iv)

Policy

- 2 The New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill will make legislative changes in response to *Taylor v Attorney-General*¹ where the High Court made a declaration that a provision of the Electoral Act 1993 is inconsistent with the Bill of Rights Act 1990 (the Bill of Rights Act). The primary purpose of the Bill is to provide for senior courts to make, and the Government to respond to, declarations of consistency.
- 3 A declaration of inconsistency is a formal statement, granted by a court as a remedy, that legislation is inconsistent with the plaintiff's fundamental human rights protected by the Bill of Rights Act. The declaration informs the public and Parliament that an Act is inconsistent with fundamental human rights. It does not affect the validity of the Act or anything done lawfully under the Act.
- 4 s9(2)(f)(iv)
s9(2)(f)(iv)

¹ *Taylor v Attorney-General* [2015] NZHC 1706

s9(2)(f)(iv)

s9(2)(f)(iv)

- 5 Section 92J of the Human Rights Act 1993 (as amended in 2001) empowers the Human Rights Review Tribunal to issue declarations of inconsistency, stating legislation is inconsistent with the right to be free from discrimination affirmed in section 19(1) of the Bill of Rights Act. Section 92K of the Human Rights Act requires the Minister responsible for administering the inconsistent legislation to inform Parliament about the declaration and provide the Government response. s9(2)(f)(iv)
- 6 The Ministry of Justice will undertake consultation with the public and relevant organisations before this policy is finalised. Cabinet approval will be sought by October 2018.

Need for legislation

- 7 Whether the courts can make declarations of inconsistency is currently before the Supreme Court. This legislation will provide clarity that the courts can make such declarations and will provide a mechanism for the government to respond.
- 8 The principal Act has not been amended in the last year, s9(2)(f)(iv)
- 9 s9(2)(f)(iv)
Although the amendment is technically straightforward, sufficient time is needed to ensure an appropriate consultation process.

Compliance

- 10 The Bill is expected to comply with each of the following:
- 10.1 the principles of the Treaty of Waitangi;
 - 10.2 the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993;
 - 10.3 the principles and guidelines set out in the Privacy Act 1993;
 - 10.4 the relevant international standards and obligations; and
 - 10.5 the *LAC Guidelines on Process and Content of Legislation* (2014 edition), which are maintained by the Legislation Design and Advisory Committee.

Binding on the Crown

- 11 Section 3 of the New Zealand Bill of Rights Act states that the Bill of Rights applies only to acts done by the legislative, executive, or judicial branches of the Government of New Zealand; or by any person or body in the performance of any public function, power, or duty

conferred or imposed on that person or body by or pursuant to law. This Bill will not propose to change that status.

Consultation

- 12 Due to the nature of the legislation, a public consultation process, as well as consultation with private organisations and relevant government departments, will be undertaken before the Bill is introduced. The Ministry of Justice has already undertaken initial consultation on the approach to declarations of inconsistency with Crown Law. The Legislation Design and Advisory Committee will also be consulted.
- 13 The Office of the Clerk will be consulted to discuss the process for a parliamentary response.

Associated regulations

- 14 It is unlikely there will be any associated regulations.

Timeline

- 15 The proposed timing for the legislation is as follows:

<i>Step</i>	<i>Proposed date</i>	<i>Consistency assurance</i>
Date on which final policy approvals were obtained from Cabinet.	s9(2)(f)(iv)	
Date on which final drafting instructions were sent to the Parliamentary Counsel Office or other drafter.		
Date on which the Bill will be released for exposure draft (if an exposure draft is planned).		
Date by which the Bill was provided to the Crown Law Office for an assessment of consistency with the New Zealand Bill of Rights Act 1990.		
Dates on which the Bill was before LEG and Cabinet for approval for introduction.		

IN CONFIDENCE

s9(2)(f)(iv)

Date by which any policy decisions for associated regulations will be before Cabinet.
Date requested for introduction of the Bill.
Date on which final policy approvals will be obtained from Cabinet for any substantive SOP to Bill (if already introduced).
Date on which final drafting instructions will be sent to the Parliamentary Counsel Office or other drafter for any substantive SOP to Bill (if already introduced).
Date on which any substantive SOP will be provided to the Crown Law Office for an assessment of consistency with the New Zealand Bill of Rights Act 1990.
Date of report back from select committee.
Date by which final drafting instructions for any associated regulations will be sent to the Parliamentary Counsel Office.
Date of enactment.
Date of commencement.

Recommendations

- 16 The Minister of Justice recommends that the Committee:
- 16.1 note that the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill will create a legislative mechanism to provide for senior courts to make, and the Government to respond to, declarations of consistency;
 - 16.2 approve the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill in the 2018 Legislation Programme, s9(2)(f)(iv)
 - 16.3 s9(2)(f)(iv)
 - 16.4 s9(2)(f)(iv)

Authorised for lodgement

Hon Andrew Little
Minister of Justice



Declarations of Inconsistency with the NZ Bill of Rights Act 1990

Hon Andrew Little, Minister of Justice
14 February 2018

1. This note provides information for your oral item to Cabinet on 19 February 2018:
 - informing Cabinet about the upcoming appeal to the Supreme Court in *Attorney-General v Taylor* (in March 2018) in respect of declarations of inconsistency with the New Zealand Bill of Rights Act 1990 (NZBORA), and
 - seek agreement that Crown Law can indicate to the Supreme Court that the Government has agreed, in principle, to introduce legislation to provide a statutory foundation for the senior courts to make declarations of inconsistency.

Why are declarations of inconsistency an issue now?

2. In July 2015, the High Court in *Taylor v Attorney-General* declared a provision of the Electoral Act 1993 that disqualifies all sentenced prisoners from voting to be inconsistent with voting rights affirmed by section 12 of NZBORA. The declaration does not affect the validity of or anything done lawfully under the Act.
3. The Crown appealed to the Court of Appeal on the basis that the courts do not have an inherent jurisdiction to make declarations of inconsistency. The Court of Appeal dismissed the appeal in May 2017, and the Crown has been granted leave to appeal to the Supreme Court. That appeal will be heard in March 2018.

You are seeking agreement due to timing of the Supreme Court appeal

4. In December 2017, you indicated your preferred approach is to amend NZBORA to create a formal legislative mechanism by which the senior courts can make such declarations. Declarations could play an important function informing Parliament about potential inconsistency with NZBORA. The Crown's position accepts that the senior courts could make declarations of inconsistency if Parliament confers that power through legislation.
5. If the Government agrees, at least in principle, to place declarations of inconsistency on a statutory footing, Crown Law could indicate this in submissions to the Supreme Court. This could be viewed favourably by the Court (obviating the need for the courts to assume an inherent power) and could be relevant to the Court's deliberations.
6. Due to the timing of the appeal, we recommend that you seek Cabinet's agreement that Crown Law can indicate to the Supreme Court that the Government has agreed, in principle, to legislate to provide a statutory foundation for declarations of inconsistency. Cabinet could then consider detailed policy proposals later in the year.
7. However, if Ministers wish to consider a wider range of options, then we consider it preferable to defer further consideration by Cabinet until after the Supreme Court has delivered its judgment.

Next Steps

8. We have attached possible recommendations for Cabinet that could form the basis of a Cabinet minute authorising Crown Law to indicate the Government's policy position to the Supreme Court.
9. Subject to the timing of a decision in the Supreme Court appeal, we plan to provide you with further advice later in the year about the design of a formal legislative mechanism for declarations of inconsistency. We will also provide advice on options for conducting public consultation prior to the introduction of any legislation.

Possible recommendations for Cabinet

1. **Note** that, in March 2018, the Supreme Court will consider a Crown appeal in *Attorney-General v Taylor*, which relates to the ability of senior courts to declare an enactment is inconsistent with one or more of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990;
2. **Note** that, regardless of the outcome in that case, the decision of the Supreme Court might require a policy response from the Government, which could include proposing amendments to the New Zealand Bill of Rights Act; and

3. EITHER

Option 1

- 3.1. **Agree**, in principle, to amend the New Zealand Bill of Rights Act to empower the senior courts to grant, as a remedy, declarations that an enactment is inconsistent with one or more of the rights and freedoms affirmed in that Act; and
- 3.2. **Agree** that Crown Law can inform the Supreme Court, as part of its submissions in *Attorney-General v Taylor*, that the Government intends to introduce legislation in 2019 to amend the New Zealand Bill of Rights Act; and
- 3.3. **Invite** the Minister of Justice submit a detailed policy proposal to Cabinet following the decision of the Supreme Court in *Attorney-General v Taylor* in 2018 seeking agreement that the Ministry of Justice issue drafting instructions to Parliamentary Counsel Office.

OR

Option 2

- 3.4. **Invite**, the Minister of Justice to submit a paper to Cabinet following the decision of the Supreme Court in *Attorney-General v Taylor* outlining policy options for declarations of inconsistency under the New Zealand Bill of Rights Act.



Cabinet Social Wellbeing Committee

Summary

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Declarations of Inconsistency with the New Zealand Bill of Rights Act

Portfolios Justice / Attorney-General

Purpose This paper seeks agreement to the amendment of the New Zealand Bill of Rights Act 1990 (the Act) to allow for senior courts to make declarations of inconsistency under the Act.

Previous Consideration None.

Summary In the *Taylor v Attorney-General* case, the High Court declared that a provision of the Electoral Act 1993 that disqualifies sentenced prisoners from registering to vote was inconsistent with voting rights in the Act. This set a precedent for the issuing of declarations of inconsistency.

A declaration of inconsistency is a formal statement that an Act of Parliament is inconsistent with fundamental human rights. Legislative machinery is needed to ensure that Parliament responds to a declaration, even if the response is to let an inconsistent law stand.

The Crown's position in the *Taylor* case is that the senior courts can exercise this power only if it is conferred on them by Parliament. Agreement is sought to amend the Act to provide a statutory basis for senior courts to issue declarations of inconsistency under the Act. This would require the government to report to Parliament in response. Comparable jurisdictions also provide for declarations of inconsistency or equivalents in legislation.

The Constitutional Advisory Panel records New Zealander's views on constitutional issues. The Panel considered amendments to the Act in its consultation process in 2012 and 2013, and in its final report recommended that the government explore options to improve the effectiveness of the Act, including giving the judiciary powers to assess legislation for consistency with the Act (discussed in paragraphs 13-15).

Further work and consultation is required to determine the process to follow after a declaration of inconsistency is made by the courts. The Minister of Justice expects to seek final policy decisions in late 2018.

Regulatory Impact Analysis

Not applicable.

Baseline Implications	None from this paper.
Legislative Implications	A statutory basis for declarations of inconsistency will require an amendment to the Act.
Timing Issues	The Minister of Justice intends to seek agreement to policy decisions following the decision of the Supreme Court to the Crown's appeal of <i>Taylor v Attorney-General</i> , which will be heard by the Supreme Court in March 2018.
Announcement	None proposed. Crown Law will inform the Supreme Court about the government position.
Proactive Release	None proposed.
Consultation	Paper prepared by MoJ and Crown Law. DPMC was consulted. The Minister of Justice and the Attorney-General indicate that New Zealand First and the Green Party were consulted.

The Minister of Justice and the Attorney-General recommend that the Committee:

- 1 note that, in March 2018, the Supreme Court will consider a Crown appeal in *Attorney-General v Taylor*, which relates to the ability of senior courts to declare an enactment is inconsistent with one or more of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Act);
- 2 agree in principle, subject to the report-back referred to in paragraph 4 below, that the Act should be amended to empower the senior courts to grant, as a remedy, declarations of inconsistency with one or more of the rights and freedoms affirmed in that Act;
- 3 agree that Crown Law can inform the Supreme Court, as part of its submissions in *Attorney-General v Taylor*, that the government intends to introduce legislation amending the Act to provide a statutory foundation for declarations of inconsistency;
- 4 invite the Minister of Justice to submit a detailed policy proposal to Cabinet, following the decision of the Supreme Court in *Attorney-General v Taylor*;
- 5 note that the Minister of Justice will direct officials to initiate preliminary discussions with key experts (e.g. the Clerk of the House and the New Zealand Law Society) as they develop more detailed policy advice.

Jenny Vickers
Committee Secretary

Hard-copy distribution:

Cabinet Social Wellbeing Committee
Office of the Prime Minister
Deputy Chief Executive, Policy, DPMC
Attorney-General

In Confidence

Office of the Minister of Justice

Office of the Attorney-General

Chair, Cabinet

DECLARATIONS OF INCONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT

Proposal

- 1 This paper proposes that Cabinet agree, in principle, to amend the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act') to provide a statutory foundation for the senior courts to make declarations of inconsistency under that Act.

Background

- 2 In *Taylor v Attorney-General*¹ the High Court declared a provision of the Electoral Act 1993 that disqualifies all sentenced prisoners from registering to vote to be inconsistent with voting rights affirmed by section 12(a) of the Bill of Rights Act. The Crown appealed to the Court of Appeal, arguing that a court cannot issue a declaration of inconsistency in the absence of a statutory power conferred by Parliament.
- 3 The Court of Appeal dismissed the appeal on the basis that the power to issue declarations derives from the common law jurisdiction to consider questions of law, including inconsistencies between statutes.² The Crown has been granted leave to appeal to the Supreme Court. That appeal will be heard in March 2018.
- 4 A declaration of inconsistency is a formal statement, granted by a court as a remedy, that an Act of Parliament is inconsistent with fundamental human rights. There is no explicit power in the Bill of Rights Act to issue declarations of inconsistency where a court considers an Act of Parliament is inconsistent with fundamental rights. The Human Rights Review Tribunal can make declarations of inconsistency in cases involving the right to be free from discrimination. Where that declaration relates to an Act, the declaration does not affect the validity of that Act of Parliament or anything done lawfully under that Act.

Declarations of inconsistency can perform an important constitution function

- 5 In New Zealand, Parliament is the final arbiter of what constitutes a justified limitation on fundamental rights and freedoms (not the courts). Declarations of inconsistency can perform an important function by informing Parliament that the senior courts consider an Act to be inconsistent with the fundamental human rights affirmed in the Bill of Rights Act. Parliament may disagree but its deliberations will have the benefit of the expert opinion of the judicial branch of government.

Declarations of inconsistency need a statutory basis

- 6 We recommend that the Bill of Rights Act be amended to provide a statutory basis for the senior courts to issue declarations of inconsistency under the Bill of Rights Act. The Crown's position in the *Taylor* case is that the senior courts could exercise such a power but only if it is conferred on them by Parliament.

¹ [2015] NZHC 1706

² *Attorney-General v Taylor* [215] NZCA 2017

- 7 Providing a legislative basis for declarations also supports the principle of comity by encouraging an ongoing conversation between Parliament and the Judiciary about justified limitations on fundamental rights in New Zealand society. The principle of comity requires the legislative and judicial branches of government each recognise the other's proper sphere of influence and privileges, with the mutual respect and restraint that is essential to their constitutional relationship.

Comparable jurisdictions have declarations of inconsistency with a statutory basis

- 8 Comparable overseas jurisdictions provide for declarations of inconsistency or equivalents in legislation. In the United Kingdom, the Human Rights Act 1998 empowers superior courts to issue declarations of legislative incompatibility with the European Convention on Human Rights. A declaration of incompatibility does not affect the validity, operation, or enforcement of the law. The Act empowers the Government to make a remedial order addressing the violation (essentially, amending the inconsistent provisions through delegated legislation) but there is no domestic legal obligation to make such an order.
- 9 In the Australian Capital Territory (ACT), the Human Rights Act 2004 empowers the courts to make a declaration of incompatibility in respect of a Territory law. In Victoria (Australia), the Victorian Charter of Human Rights and Responsibilities Act 2006 confers a similar power on the Victorian courts. A declaration by the court does not affect the validity, operation, or enforcement of the law, but does require a Parliamentary response from the Attorney-General in ACT and the responsible Minister in Victoria.
- 10 In Canada, the Supreme Court can strike down legislation that is inconsistent with the Canadian Charter of Rights and Freedoms. However, the Charter allows Parliament or provincial legislatures to expressly declare an Act to be valid for a time-limited period 'notwithstanding' most provisions of the Charter (democratic rights and freedom of movement are excluded).

There is public support for a balanced approach

- 11 In the absence of a statutory basis, the courts are likely to continue to issue declarations of inconsistency following the precedent set in the *Taylor* case (unless that precedent is overturned by the Supreme Court). In our view, it is better that these powers be given by Parliament rather than taken by the courts. Declarations of themselves provide no remedy and do not trigger any parliamentary response. Legislative machinery is needed to ensure that Parliament responds to a declaration even if the response is to let an inconsistent law stand. In this respect declarations differ from other remedies because they require legislative 'machinery' to make them operate properly.
- 12 The Constitutional Advisory Panel was appointed in August 2011 to listen to and record New Zealanders' views on constitutional issues. The Panel considered amendments to the Bill of Rights Act as part of its extensive public consultation process in 2012 and 2013. In its final report, published in November 2013, the Panel recommended the Government explore options for improving the effectiveness of the Bill of Rights Act, including giving the judiciary powers to assess legislation for consistency with that Act.
- 13 Participants acknowledged New Zealand's relatively positive human rights record, but also thought the current arrangements might be vulnerable. Parliament's ability to amend the Bill of Rights Act or to pass legislation contrary to the Act with the support of a simple majority of Parliament was of particular concern. The three approaches raised most commonly to address that concern were:
- enable the courts to declare legislation inconsistent with the Bill of Rights Act (it would remain in force) and require the Government to report to Parliament in response (for

instance, the courts could propose draft remedial legislation, which could be voted down);

- empower the courts to 'strike down' legislation or the part of it that is inconsistent with the Bill of Rights Act; and
- allow the courts to strike down legislation while preserving Parliament's power to enact legislation 'notwithstanding' any inconsistency.

- 14 The Panel found that granting courts the power to strike down legislation had some support but was explicitly rejected by a significant number of participants. It did find support for exploring increased judicial powers that preserve parliamentary sovereignty.
- 15 In our view, declarations of inconsistency strike the correct balance. The first option at paragraph 13 preserves parliamentary sovereignty but also enables Parliament to reflect on the wisdom of legislation which is inconsistent with the Bill of Rights Act. Upon reflection Parliament will sometimes adopt a remedial Bill which achieves its public policy objective in a way which is not inconsistent with the Bill of Rights. On other occasions Parliament may decide to vote down the remedial legislation thereby sticking with its view of the appropriate balance. In this way, the sovereignty of Parliament will be preserved while compliance with the Bill of Rights is improved.

Supreme Court could be informed about Government position

- 16 The Supreme Court will hear the *Taylor* appeal in March 2018. We recommend Crown Law be authorised to indicate in submissions that the Government has agreed, in principle, to provide a statutory foundation for declarations of inconsistency. This could be viewed favourably by the Supreme Court (obviating the need for the courts to confirm they have such an inherent power) and could be relevant to the Court's deliberations.

Proposed timing for further policy work

- 17 This paper seeks agreement in principle, but further policy work and consultation is required to determine the process to follow after a declaration of inconsistency is made by the courts. For example, section 92K of the Human Rights Act requires the Government to respond to declarations under that Act by informing Parliament about the declaration and provide advice about the Government's response. The Bill of Rights Act could duplicate these provisions or take approaches similar to the United Kingdom or Canada.
- 18 More detailed policy decisions should follow the Supreme Court decision in *Taylor* so the Government has the benefit of the opinion of New Zealand's most senior judges. In the meantime, we intend to initiate preliminary discussions with key experts (e.g. the Clerk of the House and the New Zealand Law Society). Subject to the timing of the Supreme Court judgment, we anticipate seeking final policy decisions in late 2018, which will allow the Government to introduce legislation early in 2019.

Consultation

- 19 The Ministry of Justice and Crown Law have consulted the Department of the Prime Minister and Cabinet about the proposals in this paper. They have not consulted more widely at this stage given the focus of this paper on agreeing an 'in principle' position primarily for the purposes of the current litigation. The Ministry of Justice and Crown Law will consult broadly within the public sector on more detailed policy proposals. Relevant Ministers and Government support partners will also be consulted on early on more detailed policy proposals.

Financial Implications

- 20 There are no financial implications arising directly out of this paper. The financial implications of declarations of inconsistency will be part of more detailed policy advice.

Human Rights

- 21 The proposals in this paper are consistent with the Bill of Rights Act and the Human Rights Act. Declarations of inconsistency support the rights affirmed in the Bill of Rights Act by providing a mechanism for inconsistencies to be recognised and acknowledged.

Legislative Implications

- 22 There are no legislative implications arising directly out of this paper but a statutory basis for declarations of inconsistency will require an amendment to the Bill of Rights Act.

Regulatory Impact Analysis

- 23 A regulatory impact statement will accompany final policy advice.

Gender Implications

- 24 There are no specific gender implications arising out of this paper. However, freedom from discrimination on the basis of sex is one of the rights affirmed in the Bill of Rights Act to which declarations of inconsistency under that Act would apply.

Disability Perspective

- 25 There are no specific disability implications arising out of this paper. However, freedom from discrimination on the basis of disability is one of the rights affirmed in the Bill of Rights Act to which declarations of inconsistency under that Act would apply.

Publicity

- 26 No publicity is proposed at this stage but we recommend Crown Law be permitted to inform the Supreme Court about the Government position. That may be published in any media reports on the court proceedings. We also propose to initiate preliminary discussions with key experts before the Supreme Court releases its judgment to develop the detail of the policy proposed in this paper.

Recommendations

- 27 The Minister of Justice and the Attorney-General recommend that Cabinet:
- 1 **Note** that, in March 2018, the Supreme Court will consider a Crown appeal in *Attorney-General v Taylor*, which relates to the ability of senior courts to declare an enactment is inconsistent with one or more of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990;
 - 2 **Agree**, in principle, that the New Zealand Bill of Rights Act should be amended to empower the senior courts to grant, as a remedy, declarations of inconsistency with one or more of the rights and freedoms affirmed in that Act;
 - 3 **Agree** that Crown Law can inform the Supreme Court, as part of its submissions in *Attorney-General v Taylor*, that the Government intends to introduce legislation amending the New Zealand Bill of Rights Act to provide a statutory foundation for declarations of inconsistency;

- 4 **Invite** the Minister of Justice to submit a detailed policy proposal to Cabinet, following the decision of the Supreme Court in *Attorney-General v Taylor*; and
- 5 **Note** the Minister of Justice will direct officials to initiate preliminary discussions with key experts (e.g. the Clerk of the House and the New Zealand Law Society) as they develop more detailed policy advice.

Authorised for lodgement

Hon Andrew Little
Minister of Justice

Hon David Parker
Attorney-General



Cabinet Social Wellbeing Committee

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Declarations of Inconsistency with the New Zealand Bill of Rights Act

Portfolios Justice / Attorney-General

On 21 February 2018, the Cabinet Social Wellbeing Committee:

- 1 **noted** that, in March 2018, the Supreme Court will consider a Crown appeal in *Attorney-General v Taylor*, which relates to the ability of senior courts to declare an enactment is inconsistent with one or more of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Act);
- 2 **agreed in principle**, subject to the report-back referred to in paragraph 4 below, that the Act should be amended to empower the senior courts to grant, as a remedy, declarations of inconsistency with one or more of the rights and freedoms affirmed in that Act;
- 3 **agreed** that Crown Law can inform the Supreme Court, as part of its submissions in *Attorney-General v Taylor*, that the government intends to introduce legislation amending the Act to provide a statutory foundation for declarations of inconsistency;
- 4 **invited** the Minister of Justice to submit a detailed policy proposal to Cabinet, following the decision of the Supreme Court in *Attorney-General v Taylor*;
- 5 **noted** that the Minister of Justice will direct officials to initiate preliminary discussions with key experts (e.g. the Clerk of the House and the New Zealand Law Society) as they develop more detailed policy advice.

Jenny Vickers
Committee Secretary

Hard-copy distribution: (see over)

Present:

Rt Hon Winston Peters
Hon Kelvin Davis
Hon Chris Hipkins
Hon Andrew Little
Hon Carmel Sepuloni (Chair)
Hon Dr David Clark (part of item)
Hon David Parker
Hon Nanaia Mahuta
Hon Damien O'Connor
Hon Tracey Martin
Hon Peeni Henare
Hon Aupito William Sio
Hon Julie Anne Genter
Michael Wood, MP
Jan Logie, MP

Hard-copy distribution:

Minister of Justice
Attorney-General

Officials present from:

Office of the Prime Minister
Department of the Prime Minister and Cabinet
Officials Committee for SWC

RELEASED UNDER THE OFFICIAL INFORMATION ACT 1982



Declarations of Inconsistency with the NZ Bill of Rights Act 1990

Hon Andrew Little, Minister of Justice
For SWC on 21 February 2018

1. This note provides information to support you taking the joint Cabinet paper, *Declarations of Inconsistency with the New Zealand Bill of Rights Act*, with the Attorney-General, to the Cabinet Social Wellbeing Committee. This paper seeks Cabinet's agreement:
 - in principle, to amend the New Zealand Bill of Rights Act 1990 (NZBORA) to empower the senior courts to grant, as a remedy, declarations of inconsistency with one or more of the rights and freedoms affirmed in NZBORA, and
 - that Crown Law can inform the Supreme Court, as part of its submissions, in *Attorney-General v Taylor*, that the Government intends to introduce legislation amending NZBORA to provide a statutory foundation for declarations of inconsistency.
2. You will also be recommending that Cabinet invite you to submit a detailed policy proposal to Cabinet following the Supreme Court's decision in *Attorney-General v Taylor*.

Why are declarations of inconsistency an issue now?

3. In July 2015, the High Court in *Taylor v Attorney-General* declared a provision of the Electoral Act 1993, which disqualifies all sentenced prisoners from voting, to be inconsistent with voting rights affirmed by section 12 of NZBORA. The Crown appealed to the Court of Appeal on the basis that the courts do not have an inherent jurisdiction to make declarations of inconsistency. The Court of Appeal dismissed the appeal in May 2017. The Supreme Court will hear a further appeal from 6 to 7 March 2018.

You are seeking agreement due to timing of the Supreme Court appeal

4. Declarations could play an important function by informing Parliament about potential inconsistency with NZBORA. The Crown's position accepts that the senior courts could make declarations of inconsistency if Parliament confers that power through legislation.
5. Due to the timing of the Supreme Court appeal, we recommend that Cabinet agree, in principle, to legislate to provide a statutory foundation for declarations of inconsistency and for Crown Law to indicate this in submissions. This could be viewed favourably by the Court (obviating the need for the courts to assume an inherent power) and could be relevant to the Court's deliberations.
6. Cabinet could consider more detailed policy proposals following the Supreme Court's decision in *Attorney-General v Taylor*. It is necessary to carefully work through what machinery is required to ensure declarations of inconsistency operate properly and effectively. The Supreme Court's decision will help to inform this work.

Next Steps

7. Subject to the timing of a decision in the Supreme Court appeal, we plan to provide you with further advice on detailed policy proposals later in the year.
8. Officials will also initiate preliminary discussions with key experts (eg the Clerk of the House and the New Zealand Law Society) and consult broadly within the public sector on more detailed policy proposals.
9. The Cabinet paper also commits to early consultation with relevant Ministers and Government support partners (paragraph 19 of Cabinet paper).



Cabinet

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Report of the Cabinet Social Wellbeing Committee: Period Ended 23 February 2018

On 26 February 2018, Cabinet made the following decisions on the work of the Cabinet Social Wellbeing Committee for the period ended 23 February 2018:

Out of scope

Out of scope

SWC-18-MIN-0006 **Declarations of Inconsistency with the
New Zealand Bill of Rights Act**
Portfolios: Justice / Attorney-General

CONFIRMED

Out of scope

Out of scope

Michael Webster
Secretary of the Cabinet

Hard-copy distribution:
Cabinet Social Wellbeing Committee



Declarations of inconsistency – preliminary discussions with key experts

Hon Andrew Little, Minister of Justice
6 April 2018

1. This note is to let you know the Ministry's proposed approach to preliminary discussions with key experts as part of further policy work on declarations of inconsistency.

Cabinet decision on declarations of inconsistency

2. On 26 February 2018, Cabinet agreed, in principle, that the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act) should be amended to empower the senior courts to grant, as a remedy, declarations of inconsistency with one or more of the rights and freedoms affirmed in the Bill of Rights Act.
3. This decision preceded the Supreme Court hearing the Crown's appeal in *Attorney-General v Taylor*, which related to the ability of senior courts to declare an enactment is inconsistent with the Bill of Rights Act. The appeal was heard in early March 2018 and we expect the Court will release its decision later this year.
4. In the meantime, the Ministry plans to undertake further policy work to enable you to submit a detailed policy proposal to Cabinet once the decision of the Supreme Court is known. You have directed officials to initiate preliminary discussions with key experts.

Proposed discussions key experts

5. We have identified key experts with whom we propose to engage in preliminary discussions. We plan to have relatively informal conversations, as opposed to formal consultation, given the purpose is to help identify any technical issues for declarations of inconsistency while we await the Supreme Court judgment.
6. We propose that the discussions take place under "Chatham House rules" so, while we will report-back on the issues discussed, we will not attribute opinions to individuals. This enables a free and frank discussion to take place. If it is desirable to attribute something said by a participant, then we will seek the permission of that person before doing so.

Organisations and individuals

7. We do not plan to engage in general public consultation, given the purpose of the discussion is to develop the technical detail of the proposal. We will meet with a small number of organisations and individuals who can provide insights into the practical implications of a power to make declarations of inconsistency.
8. The organisations we plan to approach about a meeting include:
 - New Zealand Law Society
 - Human Rights Commission
 - Human Rights Foundation
 - New Zealand Council for Civil Liberties
 - Office of the Clerk

9. We propose to approach a small number of individuals with expertise in constitutional and human rights law. It could include the following individuals:
- Rt Hon Sir Geoffrey Palmer, constitutional expert and former Prime Minister, as well as the architect of the Bill of Rights Act
 - Andrew Butler, expert in human rights law (Dr Butler was involved in the *Taylor* litigation but, given submission have now concluded, we consider it appropriate to meet with him given his particular expertise in this area)
 - David McGee and Mary Harris, former Clerks of the House, given their strong grasp of Parliamentary proceedings, and
 - Rodger Haines QC in his capacity as Chair of the Human Rights Review Tribunal, given that the proposed changes to the Bill of Rights Act could have implications for the existing power under the Human Rights Act 1993.

Academic discussions

10. We plan to talk to academics who have expertise in constitutional and human rights law. We will approach the Deans of the five law schools (Auckland, Waikato, Victoria, Canterbury, and Otago) about meeting with faculty members. We will be guided by the Deans as to which faculty members we should meet.

Comparable jurisdictions

11. We plan to contact officials from comparable jurisdictions that have declarations of inconsistency or a similar mechanism. These include Australia (Victoria and Australian Capital Territory), the United Kingdom and Canada. This will help us understand how declarations of inconsistency operate in these jurisdictions.

Possible issues for discussion

12. We have developed some possible discussion points for preliminary discussions with key experts. It is also likely that other discussion points may arise. Therefore, the following list of possible discussion points is not exhaustive:
- what kind of response, if any, could be required in or from Parliament to declarations of inconsistency
 - a right to intervene for the Attorney-General and Human Rights Commission
 - application, if any, of declarations to non-legislative acts (i.e. policies and practices of Government agencies)
 - relationship of the proposed power to make declarations to the existing power in the Human Rights Act, and
 - relationship to the other procedural provisions of the Bill of Rights Act.

Timeframes and next steps

13. We intend to start informal discussions during April and, depending on availability of participants, expect them to run over the next two or three months. The discussions will inform our advice prior to final policy decisions and we will also keep you informed about any particular issues of note as they arise.



Declarations of inconsistency – Supreme Court judgment Attorney-General v Taylor [2018] NZSC 104

Hon Andrew Little, Minister of Justice
9 November 2018

1. This note provides information on the Supreme Court decision on declarations of inconsistency.

Summary

2. On 9 November, a 3:2 majority confirmed the Court of Appeal judgment that the senior courts have jurisdiction to make declarations of inconsistency of legislation with the Bill of Rights Act (BORA).
3. Mr Taylor won his cross-appeal meaning that, contrary to the Court of Appeal's view, he does have standing.

Majority opinion (including additional points made by the Chief Justice)

4. Declarations of inconsistency flow from the requirement to have effective remedies for BORA breaches.
5. The text and purpose of the BORA overall supports the court exercising its usual range of remedies of which a declaration is a part.
6. BORA also affirms the rights under the International Covenant on Civil and Political Rights which expressly requires effective remedies.
7. The Chief Justice states: No statutory conferral of power to declare the law is required because such powers of declaration are within the inherent jurisdiction of the High Court.
8. She states declarations are a judicial response to those whose rights have been affected, rather than one to assist Parliament with its functions (as was suggested by the Court of Appeal). France and Glazebrook JJ were inclined to agree with her.
9. There is utility in granting declarations:
 - the importance of the rights enshrined and the ICCPR obligations suggest that there should be a remedy, and
 - there are no other effective remedies in cases like the present
10. Declarations do not affect Parliament's ability to legislate inconsistently with the BORA.
11. Note that the Supreme Court did not exercise discretion because this was not the argument before it. It deferred to the lower courts' decision on appropriateness of the declaration.

Dissenting opinion (Justices William Young and O'Regan)

12. In the absence of a power conferred by statute, courts do not have jurisdiction to make declarations of inconsistency.
13. While such a declaration would fall within judicial functions, a declaration would not be an effective remedy since it is not binding and has no impact on the 'victim's' position.

Approved by: Chris Kerr, Manager Civil Law and Human Rights
File number: HUM 09 01 14